be claimed, that it would be a common law offense to control telephone rates by combination and conspiracy.

It may well be stated, however, that the telephone is not of such universal demand in the conduct of business as is insurance. Commercial credit even would be withheld from merchants who would omit to carry insurance upon their business, and thus there cannot be the exercise of volition in its being carried or not. There might not be specific inquiry of a merchant in this regard, but this would be upon the presumption that one in business is not so fool-hardy as to omit to carry reasonable insurance, or that he would not encounter a refusal of credit by such an omission. Indemnity of this kind is a commodity, though technically or in the sense of the commerce clause, it is merely a contract, but a contract "of prime necessity" and therefore "an article of prime necessity."

In this wise insurance companies might be supposed to argue in justification of their existence and with greatly more of elaboration and eloquence would their zeal and experience enforce the truth of their contention, but when their business is claimed to be *juris publici*, they take another tack.

Pressed in a corner of public accountability they argue that one does not have to take out fire insurance if he does not wish, and his freedom to leave it or take it is in the sacred domain of contract. No more, however, is the merchant free to continue in business and not buy insurance than an individual is free to go hungry and not buy bread. In the one case, his business will starve, and in the other, his body will starve.

It may be true, and is, that criminal offenses should not be raised by construction, and in this civilization old common law crimes should meet a challenge in our so different an age, but if they are to be recognized at all the spirit that informs them should also be recognized.

The particular kind of thing that the law against engrossing was aimed at was injury to the public in and concerning what was a widespread, general necessity. That insurance may not be so characterized it would seem absurd to assert. It were more plausible to argue that the common law applied merely to physical, tangible things and thus allow insurance companies to escape upon a technicality.

J. F. M.

POTTS *v.* COMMONWEALTH.

Nov. 23, 1911.

[73 S. E. 470.]

1. Homicide (§ 146*)—Murder—Instructions—Burden of Proof.—It was not error to instruct that, if the jury believed from the evidence that the killing was done with a deadly weapon, then the law

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

presumes it was done with malice; and it was for the defense to satisfy the minds of the jury that it was not done with malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 265-271; Dec. Dig. § 146.*]

2. Criminal Law (§ 778*)—Instructions—Shifting Burden of Proof.—An instruction that if the jury believed that the commonwealth had proven beyond reasonable doubt that decedent was killed by accused with a deadly weapon in his previous possession, and accused relied upon self-defense, the jury must be satisfied from the evidence that the defense was a true one, was improper, as shifting the burden of proof to accused.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 778.*]

3. Criminal Law (§ 308*)—Presumption of Innocence—Operation.—The presumption of accused's innocence follows him through every stage of the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. § 308.*]

4. Criminal Law (§ 327*)—Plea of Not Guilty—Effect.—A plea of not guilty denies every essential allegation in the indictment, and places upon the prosecution the burden to prove accused's guilt beyond a reasonable doubt; and that burden can never be imposed on accused, though the evidence may shift from one side to the other, to meet the varying exigencies of the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 720; Dec. Dig. § 327.*]

5. Homicide (§ 151*)—Burden of Proof—Self-Defense.—The rule that the burden to prove accused's guilt is upon the prosecution throughout the trial is not affected by the rule that, where self-defense is pleaded, accused must set it up by affirmative proof, unless the fact appears on the commonwealth's own evidence.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 151.*]

Error to Circuit Court, Norfolk County.

Shirley Potts was convicted of murder in the second degree, and he brings error. Reversed.

John W. Happer, for plaintiff in error.
The Attorney General, for the Commonwealth.

WHITTLE, J. The plaintiff in error, Shirley Potts, brings error to a judgment of conviction of murder in the second degree, for which he was sentenced to confinement in the penitentiary for the term of 18 years.

[1, 2] At the instance of the commonwealth's attorney, the jury were instructed as follows:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

First. "The court instructs the jury that if they believe from the evidence that the commonwealth has proven beyond a reasonable doubt that the deceased was killed by the accused with a deadly weapon in his previous possession, and that the accused relies upon the defense of self-defense to excuse the act, then the jury are instructed that their minds must be satisfied from the evidence that the said defense is a true one;" and,

Second. "The court instructs the jury that, if they believe from the evidence that the killing was done with a deadly weapon, then the law presumes it was done with malice, and it is for the defense to satisfy the minds of the jury that it was not done with malice."

The giving of both these instructions was made the ground of exception, and constitutes the first assignment of error.

The last instruction, with some change of language, is the equivalent of instructions approved in Hill's Case, 43 Va. 595, Bristow's Case, 56 Va. 634, Honesty's Case, 81 Va. 284, and a long line of Virginia decisions.

[3-5] But we are of opinion that the circuit court erred in giving the first instruction. It is a fundamental principle of criminal law that a person charged with the commission of crime is presumed to be innocent; and that presumption follows the accused through every stage of the prosecution. Moreover, the plea of not guilty denies every essential allegation in the indictment, and lays upon the prosecution the burden of proving the guilt of the defendant beyond a reasonable doubt. That burden is continuous, and can never be imposed upon the accused, although the evidence may shift from one side to the other, to meet the varying exigencies of the trial.

The rule is stated with exceptional clearness and force in State *v.* Wingo, 66 Mo. 181, 27 Am. Rep. 329, where it is said: "That it devolves upon the state to establish by evidence the guilt of the accused beyond a reasonable doubt will not be controverted. The defendant by his plea of not guilty puts in issue every material allegation in the indictment. He is not required to plead specially any matter of justification or excuse. The case is not divided into two parts—one of guilt, asserted by the state; the other of innocence, asserted by the accused. He does not plead affirmatively that he is innocent, but negatively that he is not guilty; and on that issue, and that alone, the jury are to try the case throughout. There is no shifting of the burden of proof. It remains upon the state throughout the trial. The evidence may shift from one side to the other. The state may establish such facts as must result in a conviction, unless the presumption they raise be met by evidence; but still the burden of proof is on

the state to establish the guilt of the accused beyond a reasonable doubt."

This rule is not affected by the modification that in cases of homicide, where the defense of self-defense is interposed, unless the fact appears from the commonwealth's own evidence, it is incumbent upon the accused to set it up by affirmative proof. For the evidence so introduced by the defendant must be considered and weighed by the jury, along with all the other evidence in the case, in determining the ultimate proposition, whether the evidence as a whole raises a reasonable doubt on their minds as to the guilt of the accused.

This principle is recognized in Litton's Case, 101 Va. 833, 849, 44 S. E. 923, 927, where the court sustained an instruction which told the jury: "That when the commonwealth has proved that the accused has committed a homicide, and it does not appear from the circumstances given in evidence by the commonwealth that the killing was of a lower degree than murder in the second degree or in self-defense, then it is prima facie murder in the second degree, and the burden is cast upon the accused to prove that it was below murder in the second degree or in self-defense; and if the commonwealth seeks to elevate the offense to murder in the first degree, the burden is upon it to do so. Yet when the evidence is all in, then, if the evidence both for the commonwealth and the accused leave a reasonable doubt as to the guilt of the accused, the jury must find the prisoner not guilty."

The principle enunciated in the concluding paragraph of the instruction in Litton's Case is supported by the great weight of authority. Many of the cases on the subject are collected and reviewed in a comprehensive note to the case of Commonwealth v. Palmer, 222 Pa. 299, 71 Atl. 100, 128 Am. St. Rep. 809, found in 19 L. R. A. (N. S.) 483.

The instruction under review does not incorporate the qualification adverted to, and the practical effect of the omission is to impose upon the accused the burden of proving that he is not guilty.

For this error, the judgment must be reversed, and the case remanded for a new trial. It is unnecessary, therefore, to consider the remaining assignment of error, that the verdict is contrary to the evidence.

Reversed.